Supreme Court, U.S.
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No. 05-174

In the

United States Supreme Court

BONG SUN KYE, NARI KYE
and KYUNG KYE,
Petitioners,

v.

CHANG W. LEE
Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of New Jersey

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The New Jersey Affidavit of Merit Act (AMA), enacted in 1995 as a tort reform measure, requires the filing of an affidavit of merit from a putative expert, within 120 days of commencement, stating that the complaint was predicated upon some deviation from the standards applicable to the defendant-professional. Non-compliance with the affidavit requirement, if not waived by a defendant, *ipso facto* results in a mandatory dismissal of the complaint, in a manner equivalent to a statute of limitations.

In the context of automobile negligence actions, another statute enacted in 1998 by the New Jersey legislature, the Automobile Insurance Cost Reduction Act (AICRA), contains virtually identical language as the AMA, requiring an affidavit of merit within a 120 days filing. But this analogous statute has been judicially-construed as *not* requiring an affidavit "within 120 days," despite the statutory language which is substantively identical to the Affidavit of Merit Act.

The controversies behind the Affidavit of Merit Act have resulted in numerous reported cases by the New Jersey Supreme Court and the intermediate appellate court, Appellate Division of the Superior Court. In a recent case, individual Justices of the State Supreme Court have called for an outright declaration that the AMA is unconstitutional. Appellants so maintained after their case was erroneously dismissed below, and invoked settled federal constitutional *stare decisis*, including *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1981), but the New Jersey courts have not granted relief and have not even applied *Logan* to petitioners' case at all.

Petitioners respectfully maintain that review is proper under Rule 10(a) because the New Jersey courts have decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

Petitioners therefore pose:

1. Whether New Jersey violated petitioners' federal constitutional rights, under the due process, equal protection or separation-of-powers doctrines, by dismissing their suit under the Affidavit of Merit Act for not tendering an "affidavit of merit" within a 120 days of commencement of the suit, when other lawsuits under a virtually identical statutory scheme, *viz.*, the Automobile Insurance Cost Reduction Act, are not treated equally and while still other, generic tort cases, are not required to file such papers at all.

LIST OF PARTIES

The parties who participated at the Supreme Court of New Jersey were petitioners BONG SUN KYE, NARI KYE and KYUNG KYE, and respondent-defendant CHANG W. LEE. Defendant Valley Hospital, named in the initial complaint, was not served and not joined in the suit or in the state court appeals.

CORPORATE DISCLOSURE

Not applicable.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully submit their petition for a writ of certiorari to review and reverse the judgment of the New Jersey Supreme Court filed May 13, 2005, affirming judgment of the Superior Court, Appellate Division, dated February 22, 2005, affirming judgment of the trial court, Law Division, Bergen County, dated November 7, 2003, and Order dated September 12, 2003, granting defendant Chang Lee's (Lee) motion to dismiss the complaint with prejudice for failure to serve an affidavit of merit under the New Jersey Affidavit of Merit Act within 60 days of joinder of issues.

Petitioners respectfully maintain that the Affidavit of Merit Act is unconstitutional under *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1981) and related constitutional analysis under the due process, equal protection and separation-of-powers doctrines. Despite petitioners' specific reference to the *Logan*-line of federal authority, all of the New Jersey courts have ignored petitioner's objections and precluded them from entering the proverbial "court house door" with their case and controversy.

OPINIONS BELOW

The New Jersey Supreme Court's denial of discretionary review by certification, filed May 13, 2005, is annexed at Appendix, *App-1*. The Superior Court, Appellate Division's unreported judgment dated February 22, 2005, is presented at *App-3*. The Law Division's unreported decision dated September 12, 2004, is set forth at *App-8*.

STATEMENT OF JURISDICTION

The New Jersey Supreme Court issued a final order in the case, denying discretionary review by certification on May 13, 2005. The Court has jurisdiction under 28 U.S.C.A. § 1254(1) (West) and Rule 13.1 of the Supreme Court Rules.

RELEVANT CONSTITUTIONAL PROVISION

U.S. Const. Amend XIV

> . . . nor shall any state deprive any person of life liberty, or property, without *due process of law*, nor deny to any person within its jurisdiction the *equal protection of the laws*. [Emphasis added.]

N.J. Const. Article I, Paragraph I

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

N.J. Const., Article VI, Section II, Paragraph 3

> 3. The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and